

AMENDED IN ASSEMBLY JUNE 1, 2007

AMENDED IN ASSEMBLY APRIL 23, 2007

AMENDED IN ASSEMBLY MARCH 29, 2007

CALIFORNIA LEGISLATURE—2007–08 REGULAR SESSION

## ASSEMBLY BILL

**No. 442**

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**Introduced by Assembly Members Parra and Leno**

***(Principal coauthor: Assembly Member Spitzer)***

***(Coauthors: Assembly Members Galgiani and Sharon Runner)***

***(Coauthor: Senator Migden)***

February 16, 2007

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An act to amend Sections 311.1, 311.2, 311.3, 311.4, and 311.9 of the Penal Code, relating to sex offenses.

### LEGISLATIVE COUNSEL'S DIGEST

AB 442, as amended, Parra. Sex offenses.

Existing law establishes the offense of sexual exploitation of a child, and provides that it shall be punished by a fine of not more than \$2,000, by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment. Existing law provides that a violation of these provisions by a person who has previously suffered a conviction for this offense is a felony.

This bill would provide that a first offense may be punished by a fine of not more than \$2,000, by imprisonment in a county jail not exceeding one year, or as a felony, or by both that fine and imprisonment.

Existing law establishes the offense of using a minor for certain prohibited acts.

This bill would provide that every person who violates those provisions and has previously been convicted of an offense which

requires registration as a sex offender, or who has been adjudicated a sexually violent predator, is guilty of a felony punishable by imprisonment in the state prison for 2, 4, or 6 years.

Existing law establishes the offense of possessing, preparing, or distributing obscene material, as specified.

This bill would provide that every person who violates certain of those provisions and has either previously been convicted of an offense for which registration as a sex offender is required, or who has been adjudicated a sexually violent predator, is guilty of a felony punishable by imprisonment in the state prison for 2, 4, or 6 years.

This bill would make other technical, clarifying changes to specified sentencing provisions relating to sex offenses involving minors.

By changing the punishment for existing crimes, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.

State-mandated local program: yes.

*The people of the State of California do enact as follows:*

1     SECTION 1. Section 311.1 of the Penal Code is amended to  
2     read:  
3     311.1. (a) Every person who knowingly sends or causes to be  
4     sent, or brings or causes to be brought, into this state for sale or  
5     distribution, or in this state possesses, prepares, publishes,  
6     produces, develops, duplicates, or prints any representation of  
7     information, data, or image, including, but not limited to, any film,  
8     filmstrip, photograph, negative, slide, photocopy, videotape, video  
9     laser disc, computer hardware, computer software, computer floppy  
10    disc, data storage media, CD-ROM, or computer-generated  
11    equipment or any other computer-generated image that contains  
12    or incorporates in any manner, any film or filmstrip, with intent  
13    to distribute or to exhibit to, or to exchange with, others, or who  
14    offers to distribute, distributes, or exhibits to, or exchanges with,  
15    others, any obscene matter, knowing that the matter depicts a  
16    person under the age of 18 years personally engaging in or

1 personally simulating sexual conduct, as defined in Section 311.4,  
2 shall be punished either by imprisonment in the county jail for up  
3 to one year, by a fine not to exceed one thousand dollars (\$1,000),  
4 or by both the fine and imprisonment, or by imprisonment in the  
5 state prison, by a fine not to exceed ten thousand dollars (\$10,000),  
6 or by the fine and imprisonment; provided however, that every  
7 person who violates this subdivision and has previously been  
8 convicted of an offense for which registration pursuant to Section  
9 290 is required, or who has been adjudicated a sexually violent  
10 predator pursuant to Article 4 (commencing with Section 6600)  
11 of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions  
12 Code, is guilty of a felony and shall be punished by imprisonment  
13 in the state prison for two, four, or six years.

14 (b) This section does not apply to the activities of law  
15 enforcement and prosecuting agencies in the investigation and  
16 prosecution of criminal offenses or to legitimate medical, scientific,  
17 or educational activities, or to lawful conduct between spouses.

18 (c) This section does not apply to matter which depicts a child  
19 under the age of 18, which child is legally emancipated, including  
20 lawful conduct between spouses when one or both are under the  
21 age of 18.

22 (d) It does not constitute a violation of this section for a  
23 telephone corporation, as defined by Section 234 of the Public  
24 Utilities Code, to carry or transmit messages described in this  
25 chapter or perform related activities in providing telephone  
26 services.

27 SEC. 2. Section 311.2 of the Penal Code is amended to read:

28 311.2. (a) Every person who knowingly sends; or causes to  
29 be sent, or brings or causes to be brought, into this state for sale  
30 or distribution, or in this state possesses, prepares, publishes,  
31 produces, or prints, with intent to distribute or to exhibit to others,  
32 or who offers to distribute, distributes, or exhibits to others, any  
33 obscene matter is for a first offense, guilty of a misdemeanor. If  
34 the person has previously been convicted of any violation of this  
35 section, the court may, in addition to the punishment authorized  
36 in Section 311.9, impose a fine not exceeding fifty thousand dollars  
37 (\$50,000).

38 (b) Every person who knowingly sends or causes to be sent, or  
39 brings or causes to be brought, into this state for sale or distribution,  
40 or in this state possesses, prepares, publishes, produces, develops,

1 duplicates, or prints any representation of information, data, or  
2 image, including, but not limited to, any film, filmstrip, photograph,  
3 negative, slide, photocopy, videotape, video laser disc, computer  
4 hardware, computer software, computer floppy disc, data storage  
5 media, CD-ROM, or computer-generated equipment or any other  
6 computer-generated image that contains or incorporates in any  
7 manner, any film or filmstrip, with intent to distribute or to exhibit  
8 to, or to exchange with, others for commercial consideration, or  
9 who offers to distribute, distributes, or exhibits to, or exchanges  
10 with, others for commercial consideration, any obscene matter,  
11 knowing that the matter depicts a person under the age of 18 years  
12 personally engaging in or personally simulating sexual conduct,  
13 as defined in Section 311.4, is guilty of a felony and shall be  
14 punished by imprisonment in the state prison for two, three, or six  
15 years, or by a fine not exceeding one hundred thousand dollars  
16 (\$100,000), in the absence of a finding that the defendant would  
17 be incapable of paying that fine, or by both that fine and  
18 imprisonment. Every person who violates this subdivision and has  
19 previously been convicted of an offense for which registration  
20 pursuant to Section 290 is required, or who has been adjudicated  
21 a sexually violent predator pursuant to Article 4 (commencing  
22 with Section 6600) of Chapter 2 of Part 2 of Division 6 of the  
23 Welfare and Institutions Code, is guilty of a felony and shall be  
24 punished by imprisonment in the state prison for two, four, or six  
25 years.

26 (c) Every person who knowingly sends or causes to be sent, or  
27 brings or causes to be brought, into this state for sale or distribution,  
28 or in this state possesses, prepares, publishes, produces, develops,  
29 duplicates, or prints any representation of information, data, or  
30 image, including, but not limited to, any film, filmstrip, photograph,  
31 negative, slide, photocopy, videotape, video laser disc, computer  
32 hardware, computer software, computer floppy disc, data storage  
33 media, CD-ROM, or computer-generated equipment or any other  
34 computer-generated image that contains or incorporates in any  
35 manner, any film or filmstrip, with intent to distribute or exhibit  
36 to, or to exchange with, a person 18 years of age or older, or who  
37 offers to distribute, distributes, or exhibits to, or exchanges with,  
38 a person 18 years of age or older any matter, knowing that the  
39 matter depicts a person under the age of 18 years personally  
40 engaging in or personally simulating sexual conduct, as defined

1 in Section 311.4, shall be punished by imprisonment in the county  
2 jail for up to one year, or by a fine not exceeding two thousand  
3 dollars (\$2,000), or by both that fine and imprisonment, or by  
4 imprisonment in the state prison. It is not necessary to prove  
5 commercial consideration or that the matter is obscene in order to  
6 establish a violation of this subdivision. Every person who violates  
7 this subdivision and has previously been convicted of an offense  
8 for which registration pursuant to Section 290 is required, or who  
9 has been adjudicated a sexually violent predator pursuant to Article  
10 4 (commencing with Section 6600) of Chapter 2 of Part 2 of  
11 Division 6 of the Welfare and Institutions Code, is guilty of a  
12 felony and shall be punished by imprisonment in the state prison  
13 for two, four, or six years.

14 (d) Every person who knowingly sends or causes to be sent, or  
15 brings or causes to be brought, into this state for sale or distribution,  
16 or in this state possesses, prepares, publishes, produces, develops,  
17 duplicates, or prints any representation of information, data, or  
18 image, including, but not limited to, any film, filmstrip, photograph,  
19 negative, slide, photocopy, videotape, video laser disc, computer  
20 hardware, computer software, computer floppy disc, data storage  
21 media, CD-ROM, or computer-generated equipment or any other  
22 computer-generated image that contains or incorporates in any  
23 manner, any film or filmstrip, with intent to distribute or exhibit  
24 to, or to exchange with, a person under 18 years of age, or who  
25 offers to distribute, distributes, or exhibits to, or exchanges with,  
26 a person under 18 years of age any matter, knowing that the matter  
27 depicts a person under the age of 18 years personally engaging in  
28 or personally simulating sexual conduct, as defined in Section  
29 311.4, is guilty of a felony. It is not necessary to prove commercial  
30 consideration or that the matter is obscene in order to establish a  
31 violation of this subdivision. Every person who violates this  
32 subdivision and has previously been convicted of an offense for  
33 which registration pursuant to Section 290 is required, or who has  
34 been adjudicated a sexually violent predator pursuant to Article 4  
35 (commencing with Section 6600) of Chapter 2 of Part 2 of Division  
36 6 of the Welfare and Institutions Code, is guilty of a felony and  
37 shall be punished by imprisonment in the state prison for two, four,  
38 or six years.

39 (e) Subdivisions (a) to (d), inclusive, do not apply to the  
40 activities of law enforcement and prosecuting agencies in the

1 investigation and prosecution of criminal offenses, to legitimate  
2 medical, scientific, or educational activities, or to lawful conduct  
3 between spouses.

4 (f) This section does not apply to matter that depicts a legally  
5 emancipated child under the age of 18 years or to lawful conduct  
6 between spouses when one or both are under the age of 18 years.

7 (g) It does not constitute a violation of this section for a  
8 telephone corporation, as defined by Section 234 of the Public  
9 Utilities Code, to carry or transmit messages described in this  
10 chapter or to perform related activities in providing telephone  
11 services.

12 SEC. 3. Section 311.3 of the Penal Code is amended to read:

13 311.3. (a) A person is guilty of sexual exploitation of a child  
14 if he or she knowingly develops, duplicates, prints, or exchanges  
15 any representation of information, data, or image, including, but  
16 not limited to, any film, filmstrip, photograph, negative, slide,  
17 photocopy, videotape, video laser disc, computer hardware,  
18 computer software, computer floppy disc, data storage media,  
19 CD-ROM, or computer-generated equipment or any other  
20 computer-generated image that contains or incorporates in any  
21 manner, any film or filmstrip that depicts a person under the age  
22 of 18 years engaged in an act of sexual conduct.

23 (b) As used in this section, "sexual conduct" means any of the  
24 following:

25 (1) Sexual intercourse, including genital-genital, oral-genital,  
26 anal-genital, or oral-anal, whether between persons of the same or  
27 opposite sex or between humans and animals.

28 (2) Penetration of the vagina or rectum by any object.

29 (3) Masturbation for the purpose of sexual stimulation of the  
30 viewer.

31 (4) Sadomasochistic abuse for the purpose of sexual stimulation  
32 of the viewer.

33 (5) Exhibition of the genitals or the pubic or rectal area of any  
34 person for the purpose of sexual stimulation of the viewer.

35 (6) Defecation or urination for the purpose of sexual stimulation  
36 of the viewer.

37 (c) Subdivision (a) does not apply to the activities of law  
38 enforcement and prosecution agencies in the investigation and  
39 prosecution of criminal offenses or to legitimate medical, scientific,  
40 or educational activities, or to lawful conduct between spouses.

1 (d) (1) Every person who violates subdivision (a) shall be  
2 punished by a fine of not more than two thousand dollars (\$2,000)  
3 or by imprisonment in a county jail for not more than one year, or  
4 by imprisonment in the state prison, or by both that fine and  
5 imprisonment.

6 (2) Every person who violates subdivision (a) and who has been  
7 previously convicted of a violation of any section of this chapter  
8 is guilty of a felony.

9 (3) Every person who violates subdivision (a) and has previously  
10 been convicted of an offense for which registration pursuant to  
11 Section 290 is required, or who has been adjudicated a sexually  
12 violent predator pursuant to Article 4 (commencing with Section  
13 6600) of Chapter 2 of Part 2 of Division 6 of the Welfare and  
14 Institutions Code, is guilty of a felony and shall be punished by  
15 imprisonment in the state prison for two, four, or six years.

16 (e) The provisions of this section do not apply to an employee  
17 of a commercial film developer who is acting within the scope of  
18 his or her employment and in accordance with the instructions of  
19 his or her employer, provided that the employee has no financial  
20 interest in the commercial developer by which he or she is  
21 employed.

22 (f) Subdivision (a) does not apply to matter that is unsolicited  
23 and is received without knowledge or consent through a facility,  
24 system, or network over which the person or entity has no control.

25 SEC. 4. Section 311.4 of the Penal Code is amended to read:

26 311.4. (a) Every person who, with knowledge that a person is  
27 a minor, or who, while in possession of any facts on the basis of  
28 which he or she should reasonably know that the person is a minor,  
29 hires, employs, or uses the minor to do or assist in doing any of  
30 the acts described in Section 311.2, shall be punished by  
31 imprisonment in the county jail for up to one year, or by a fine not  
32 exceeding two thousand dollars (\$2,000), or by both that fine and  
33 imprisonment, or by imprisonment in the state prison. If the person  
34 has previously been convicted of a violation of Section 311.3, as  
35 added by Chapter 2147 of the Statutes of 1961, a violation of this  
36 subdivision is punishable as a felony, and the court may impose a  
37 fine not exceeding fifty thousand dollars (\$50,000). Every person  
38 who violates this subdivision and has previously been convicted  
39 of an offense for which registration pursuant to Section 290 is  
40 required, or who has been adjudicated a sexually violent predator

1 pursuant to Article 4 (commencing with Section 6600) of Chapter  
2 2 of Part 2 of Division 6 of the Welfare and Institutions Code, is  
3 guilty of a felony and shall be punished by imprisonment in the  
4 state prison for two, four, or six years.

5 (b) Every person who, with knowledge that a person is a minor  
6 under the age of 18 years, or who, while in possession of any facts  
7 on the basis of which he or she should reasonably know that the  
8 person is a minor under the age of 18 years, knowingly promotes,  
9 employs, uses, persuades, induces, or coerces a minor under the  
10 age of 18 years, or any parent or guardian of a minor under the  
11 age of 18 years under his or her control who knowingly permits  
12 the minor, to engage in or assist others to engage in either posing  
13 or modeling alone or with others for purposes of preparing any  
14 representation of information, data, or image, including, but not  
15 limited to, any film, filmstrip, photograph, negative, slide,  
16 photocopy, videotape, video laser disc, computer hardware,  
17 computer software, computer floppy disc, data storage media,  
18 CD-ROM, or computer-generated equipment or any other  
19 computer-generated image that contains or incorporates in any  
20 manner, any film, filmstrip, or a live performance involving, sexual  
21 conduct by a minor under the age of 18 years alone or with other  
22 persons or animals, for commercial purposes, is guilty of a felony  
23 and shall be punished by imprisonment in the state prison for three,  
24 six, or eight years.

25 (c) Every person who, with knowledge that a person is a minor  
26 under the age of 18 years, or who, while in possession of any facts  
27 on the basis of which he or she should reasonably know that the  
28 person is a minor under the age of 18 years, knowingly promotes,  
29 employs, uses, persuades, induces, or coerces a minor under the  
30 age of 18 years, or any parent or guardian of a minor under the  
31 age of 18 years under his or her control who knowingly permits  
32 the minor, to engage in or assist others to engage in either posing  
33 or modeling alone or with others for purposes of preparing any  
34 representation of information, data, or image, including, but not  
35 limited to, any film, filmstrip, photograph, negative, slide,  
36 photocopy, videotape, video laser disc, computer hardware,  
37 computer software, computer floppy disc, data storage media,  
38 CD-ROM, or computer-generated equipment or any other  
39 computer-generated image that contains or incorporates in any  
40 manner, any film, filmstrip, or a live performance involving, sexual



1 conduct by a minor under the age of 18 years alone or with other  
2 persons or animals, is guilty of a felony. Every person who violates  
3 this subdivision and has previously been convicted of an offense  
4 for which registration pursuant to Section 290 is required, or who  
5 has been adjudicated a sexually violent predator pursuant to Article  
6 4 (commencing with Section 6600) of Chapter 2 of Part 2 of  
7 Division 6 of the Welfare and Institutions Code, is guilty of a  
8 felony and shall be punished by imprisonment in the state prison  
9 for two, four, or six years. It is not necessary to prove commercial  
10 purposes in order to establish a violation of this subdivision.

11 (d) (1) As used in subdivisions (b) and (c), “sexual conduct”  
12 means any of the following, whether actual or simulated: sexual  
13 intercourse, oral copulation, anal intercourse, anal oral copulation,  
14 masturbation, bestiality, sexual sadism, sexual masochism,  
15 penetration of the vagina or rectum by any object in a lewd or  
16 lascivious manner, exhibition of the genitals or pubic or rectal area  
17 for the purpose of sexual stimulation of the viewer, any lewd or  
18 lascivious sexual act as defined in Section 288, or excretory  
19 functions performed in a lewd or lascivious manner, whether or  
20 not any of the above conduct is performed alone or between  
21 members of the same or opposite sex or between humans and  
22 animals. An act is simulated when it gives the appearance of being  
23 sexual conduct.

24 (2) As used in subdivisions (b) and (c), “matter” means any  
25 film, filmstrip, photograph, negative, slide, photocopy, videotape,  
26 video laser disc, computer hardware, computer software, computer  
27 floppy disc, or any other computer-related equipment or  
28 computer-generated image that contains or incorporates in any  
29 manner, any film, filmstrip, photograph, negative, slide, photocopy,  
30 videotape, or video laser disc.

31 (e) This section does not apply to a legally emancipated minor  
32 or to lawful conduct between spouses if one or both are under the  
33 age of 18.

34 (f) In every prosecution under this section involving a minor  
35 under the age of 14 years at the time of the offense, the age of the  
36 victim shall be pled and proven for the purpose of the enhanced  
37 penalty provided in Section 647.6. Failure to plead and prove that  
38 the victim was under the age of 14 years at the time of the offense  
39 is not a bar to prosecution under this section if it is proven that the  
40 victim was under the age of 18 years at the time of the offense.

1 SEC. 5. Section 311.9 of the Penal Code is amended to read:

2 311.9. (a) Every person who violates subdivision (a) of Section  
3 311.2 or Section 311.5 is punishable by fine of not more than one  
4 thousand dollars (\$1,000) plus five dollars (\$5) for each additional  
5 unit of material coming within the provisions of this chapter, which  
6 is involved in the offense, not to exceed ten thousand dollars  
7 (\$10,000), or by imprisonment in the county jail for not more than  
8 six months plus one day for each additional unit of material coming  
9 within the provisions of this chapter, and which is involved in the  
10 offense, not to exceed a total of 360 days in the county jail, or by  
11 both that fine and imprisonment. If that person has previously been  
12 convicted of any offense in this chapter, or of a violation of Section  
13 313.1, a violation of subdivision (a) of Section 311.2 or Section  
14 311.5 is punishable as a felony.

15 (b) Every person who violates Section 311.7 is punishable by  
16 fine of not more than one thousand dollars (\$1,000) or by  
17 imprisonment in the county jail for not more than six months, or  
18 by both that fine and imprisonment. For a second and subsequent  
19 offense he or she shall be punished by a fine of not more than two  
20 thousand dollars (\$2,000), or by imprisonment in the county jail  
21 for not more than one year, or by both that fine and imprisonment.  
22 If the person has been twice convicted of a violation of this chapter,  
23 a violation of Section 311.7 is punishable as a felony.

24 SEC. 6. No reimbursement is required by this act pursuant to  
25 Section 6 of Article XIII B of the California Constitution because  
26 the only costs that may be incurred by a local agency or school  
27 district will be incurred because this act creates a new crime or  
28 infraction, eliminates a crime or infraction, or changes the penalty  
29 for a crime or infraction, within the meaning of Section 17556 of  
30 the Government Code, or changes the definition of a crime within  
31 the meaning of Section 6 of Article XIII B of the California  
32 Constitution.